

Proposed technical amendment:

SECTION #.(a) The Revisor of Statutes shall replace "the mentally retarded" with "individuals with intellectual disabilities" in the following statutes: G.S. 108A-58.2, 108A-61.1, and 108A-70.5.

[Staff Note: Subsections (b) through (e) of this section would consist of similar amendments to G.S. 122C-23, 131E-267, 131E-272, and 160D-907, to be presented at a later meeting.]

Explanation: This technical correction would replace remaining references to "mentally retarded" or "mental retardation" or associated acronyms with People First Language.

Background:**§ 108A-58.2. Waiver of transfer of assets penalty due to undue hardship.**

(a) Prior to imposition of a period of ineligibility for long-term care services because of an asset transfer, also known as a penalty period, the county department of social services shall notify the individual of the individual's right to request a waiver of the penalty period because it will cause an undue hardship to the individual. The director of the county department of social services, or the director's designee shall grant a waiver of the penalty period due to undue hardship if the individual meets the conditions set forth in subsection (e) of this section. As used in this section, "long term care services" are those services described in 42 U.S.C. § 1396p(c)(1)(C)(i) and (ii).

(b) When a Medicaid applicant who is requesting Medicaid to pay for institutional care requests a waiver of a penalty period due to undue hardship, the determination of whether to waive the penalty period shall be processed as part of the Medicaid application and is subject to the application processing standards set forth in 10A NCAC 21B.0203.

(c) When an ongoing Medicaid recipient applies for institutional care or is receiving Medicaid payment for institutional care receives the notice described in subsection (a) of this section, the recipient has 12 calendar days from the date of the notice to request a waiver of the penalty due to undue hardship. The following are the procedures for processing the waiver request:

- (1) Within five work days of receipt of a request for a waiver of the transfer of assets penalty, the county department of social services shall notify the individual in writing of the information and documentation necessary to determine if the requirements for approving the undue hardship waiver are met.
- (2) The individual shall have 12 calendar days from the date of the notice specified in subdivision (1) of this subsection to provide the necessary information and documentation to establish the undue hardship.
- (3) If at the end of the first 12 calendar day period the necessary information and documentation has not been received by the county department of social services, the county department of social services shall again notify the individual of the necessary information and documentation. The individual shall be given an additional 12 calendar days to provide the information and documentation.
- (4) If the individual fails to request the undue hardship waiver within 12 calendar days from the date of the notice described in subsection (a) of this section, the county department of social services shall impose the transfer of assets penalty in accordance with notice requirements in G.S. 108A-79.

- (5) If by the end of the 12 calendar days from the notice described in subdivision (3) of this subsection, the necessary information and documentation has not been received by the county department of social services, the county department of social services shall deny the request for waiver of the penalty for undue hardship and notify the individual of the denial in accordance with G.S. 108A-79.
- (6) If by the end of the time allowed under subdivisions (2) and (3) of this subsection the county department of social services has received the necessary information and documentation, the county department of social services shall make a determination of whether the imposition of the penalty period would cause an undue hardship to the individual. The county department of social services shall complete the determination and notify the individual, pursuant to subsection (g) of this section, of whether the imposition of the penalty period will be waived due to undue hardship within 12 calendar days of the receipt of the necessary information and documentation.
- (7) If as part of the determination described in subdivision (6) of this subsection the county department of social services identifies the need for additional information and documentation, it shall notify the individual in writing of that information and documentation. This notice shall initiate a new period of time for the individual to provide the information and documentation as set forth in subdivisions (2) and (3) of this subsection. Within 12 calendar days of the receipt of the additional information and documentation, the county department of social services shall complete the determination and notify the individual, pursuant to subsection (g) of this section, of whether the imposition of the penalty period will be waived due to undue hardship.

(d) As required by 42 U.S.C. § 1396p(c)(2)(D), the facility in which an institutionalized individual is residing may request an undue hardship waiver on behalf of the institutionalized individual with the written consent of the individual or the personal representative of the individual. A facility applying for a waiver for an individual residing in the facility shall adhere to the requirements of this section but shall not be required to advance the costs of acquiring an attorney to aid the institutionalized individual.

(e) Except as provided for in subsection (f) of this section, undue hardship exists if the imposition of the penalty period would deprive the individual of medical care, such that the individual's health or life would be endangered; or of food, clothing, shelter, or other necessities of life. The individual must provide the information and documentation necessary to demonstrate to the director of the county department of social services or the director's designee that:

- (1) The individual currently has no alternative income or resources available to provide the medical care or food, clothing, shelter, or other necessities of life that the individual would be deprived of due to the imposition of the penalty; and
- (2) The individual or some other person acting on the individual's behalf is making a good faith effort to pursue all reasonable means to recover the transferred asset or the fair market value of the transferred asset, which may include:
 - a. Seeking the advice of an attorney and pursuing legal or equitable remedies such as asset freezing, assignment, or injunction; or seeking modification, avoidance, or nullification of a financial instrument,

promissory note, loan, mortgage or other property agreement, or other similar transfer agreement; and

- b. Cooperating with any attempt to recover the transferred asset or the fair market value of the transferred asset.

(3) The following definitions shall apply to this subsection.

- a. "Health or life would be endangered" means a medical doctor with knowledge of the individual's medical condition certifies in writing that in his or her professional opinion, the individual will be in danger of death or the individual's health will suffer irreparable harm if a penalty period is imposed.
- b. "Other necessities of life" includes basic, life sustaining utilities, including water, heat, electricity, phone, and other items or activities that without which the individual's health or life would be endangered.
- c. "Income" means all income of the individual and the community spouse less a protected amount for the community spouse equal to the minimum monthly maintenance needs allowance as determined under 42 U.S.C. § 1396r-5(d), including in all circumstances the excess shelter allowance described under 42 U.S.C. § 1396r-5(d)(3)(A)(ii), without regard to any adjustment that would be made under 42 U.S.C. § 1396r-5(e), plus fifty percent (50%) of such income in excess of the protected amount.
- d. "Resources" means all resources of the individual and of the community spouse except the homesite in which the individual or community spouse has an equity interest not exceeding five hundred thousand dollars (\$500,000), a motor vehicle in which the individual or community spouse has an equity interest not exceeding thirty thousand dollars (\$30,000), personal property, and, in the case of a community spouse, a portion of such other resources in an amount equal to the community spouse resource allowance as defined by 42 U.S.C. § 1396r-5(f)(2), provided that such amount shall not exceed sixty percent (60%) of the maximum community spouse resource allowance as defined by 42 U.S.C. § 1396r-5(f)(2)(A)(ii). For purposes of this sub-subdivision, "homesite" means the principal place of residence of the individual or the community spouse in which the individual or community spouse has an equity interest.

(f) An undue hardship shall not exist when the application of a transfer of assets penalty merely causes the individual an inconvenience or restricts the individual's lifestyle.

(g) If the director of the county department of social services or the director's designee determines that:

- (1) An undue hardship exists, the county department of social services shall waive the penalty period and notify the individual of approval of the waiver of the penalty in accordance with G.S. 108A-79.
- (2) An undue hardship does not exist, the county department of social services shall deny the request for the waiver of the penalty and notify the individual of denial of the waiver request in accordance with G.S. 108A-79.

(h) During a penalty period that has been waived because of undue hardship, acquisition by the individual of new or increased income or resources shall be treated as a change in situation and evaluated pursuant to the rules adopted by the Department of Health and Human Services.

(i) While the determination on a request for a waiver of the penalty period due to undue hardship is pending, Medicaid shall not make payments for nursing facility services or intermediate care facility for **the mentally retarded** services to hold a bed for the individual, as described in 42 U.S.C. § 1396p(c)(2)(D). However, if the individual is institutionalized and receiving Medicaid payment for services, Medicaid will maintain the same level of services until the last day of the month after the latter of the following:

- (1) Expiration of the 10 workday period following the notice required by G.S. 108A-79, or
- (2) The date of the decision of a local appeal hearing described in G.S. 108A-79 is issued if the individual requests an appeal of the imposition of a transfer of assets penalty period within the 10 workday period described in subdivision (1) of subsection (i) of this section. (2007-442, s. 3(a).)

§ 108A-61.1. Financial responsibility of a parent for a child under age 21 in a medical institution.

Notwithstanding any other provisions of the law, for the purpose of determining eligibility for medical assistance under Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq., the income and financial resources of the natural or adoptive parents of a person who is under the age of 21 and who requires Medicaid covered services in a medical institution shall not be counted if the patient's physician certifies, and the Division of Health Benefits or its agents approve, that continuous care and treatment are expected to exceed 12 months. For purposes of this subsection, "medical institution" means licensed acute care inpatient medical facilities providing medical, surgical, and psychiatric or substance abuse treatment, or facilities providing skilled or intermediate care, including intermediate care for **the mentally retarded**. (1993, c. 386, s. 1; 2019-81, s. 15(a).)

§ 108A-70.5. Medicaid Estate Recovery Plan.

(a) There is established in the Department of Health and Human Services, the Medicaid Estate Recovery Plan, as required by the Omnibus Budget Reconciliation Act of 1993, to recover from the estates of recipients of medical assistance an equitable amount of the State and federal shares of the cost paid for the recipient. The Department shall administer the program in accordance with applicable federal law and regulations, including those under Title XIX of the Social Security Act, 42 U.S.C. § 1396(p).

(b) The following definitions apply in this section:

- (1) Medical assistance. – Medical care services paid for by the North Carolina Medicaid Program on behalf of the recipient:
 - a. If the recipient of any age is receiving medical care services as an inpatient in a nursing facility, intermediate care facility for **the mentally retarded**, or other medical institution, and cannot reasonably be expected to be discharged to return home; or
 - b. If the recipient is 55 years of age or older and is receiving one or more of the following medical care services:
 1. Nursing facility services.

2. Home and community-based services.
3. Hospital care.
- 3a. Prescription drugs.
4. Personal care services.
- 5 through 9. Repealed by Session Laws 2007-442, s. 1, effective August 23, 2007.

- (2) Estate. – All the real and personal property considered assets of the estate available for the discharge of debt pursuant to G.S. 28A-15-1. The Department has all rights available to estate creditors, including the right to qualify as personal representative or collector of an estate. For individuals who have received benefits under a qualified long-term care partnership policy as described in G.S. 108A-70.4, "estate" also includes any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.
- (3) Repealed by Session Laws 2007-442, s. 1, effective August 23, 2007.

(c) The amount the Department recovers from the estate of any recipient shall not exceed the amount of medical assistance made on behalf of the recipient and shall be recoverable only for medical care services prescribed in subsection (b) of this section. The Department is a sixth-class creditor, as prescribed in G.S. 28A-19-6, for purposes of determining the order of claims against an estate; provided, however, that judgments in favor of other sixth-class creditors docketed and in force before the Department seeks recovery for medical assistance shall be paid prior to recovery by the Department.

(d) The Department of Health and Human Services shall adopt rules pursuant to Chapter 150B of the General Statutes to implement the Plan, including rules to waive whole or partial recovery when this recovery would be inequitable because it would work an undue hardship or because it would not be administratively cost-effective and rules to ensure that all recipients are notified that their estates are subject to recovery at the time they become eligible to receive medical assistance.

(e) Repealed by Session Laws 2007-442, s. 1, effective August 23, 2007.

(f) With regard to any recipient who has received compensation pursuant to Part 30 of Article 9 of Chapter 143B of the General Statutes, the Department shall reduce the amount of any recovery it seeks from the deceased recipient's estate under this section by the amount of the resource disregard provided for in G.S. 143B-426.56(b)(1). (1993 (Reg. Sess., 1994), c. 769, s. 25.47(a); 1997-443, s. 11A.118(a); 2002-126, s. 10.11(b); 2005-276, s. 10.21C(a); 2005-345, s. 16; 2006-66, s. 10.9B; 2007-145, s. 10; 2007-323, ss. 10.42(a), (b); 2007-442, s. 1(a); 2010-68, s. 2; 2012-18, s. 3.6; 2013-378, s. 2; 2014-100, s. 6.13(f).)

§ 131E-176. Definitions.

The following definitions apply in this Article:

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- (14a) Intermediate care facility for individuals with intellectual disabilities. – Facilities licensed pursuant to Article 2 of Chapter 122C of the General Statutes for the purpose of providing health and habilitative services based on the

developmental model and principles of normalization for individuals with intellectual disabilities, autism, cerebral palsy, epilepsy or related conditions.

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[Staff Note: In 2010, the U.S. Congress enacted a law to replace "mental retardation" with "intellectual disability" or "intellectual disabilities" in the U.S. Code. Rosa's Law, Pub. L. No. 111-256.]